

Berg, Elizabeth

From: Nicholas W. van Aelstyn <NvanAelstyn@bdlaw.com>
Sent: Monday, October 21, 2013 9:13 AM
To: Berg, Elizabeth
Cc: Tennis, Rachel
Subject: FW: Yosemite Slough
Attachments: Ltr to EPA re SLC Request to be Removed as a PRP (10-17-13).PDF; The 1968 Burton Act (reflecting all amendments thru 1994).pdf

Thanne,

I'm afraid I didn't have your new email address when I sent this last week.

Nico

From: Nicholas W. van Aelstyn
Sent: Thursday, October 17, 2013 7:41 PM
To: Rachel Tennis (Tennis.Rachel@epa.gov)
Cc: Thanne Berg (cox.elizabeth@epa.gov)
Subject: Yosemite Slough

Dear Rachel,

Welcome back. Attached is the letter regarding the State Lands Commission letter to EPA that I discussed with you and Thanne just before the Government shutdown. Please let me know if you have any questions about it.

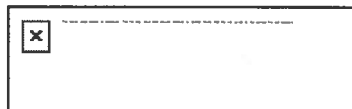
Also, when we spoke you and Thanne indicated that EPA was prepared to share documents relating to its reconsideration of its prior GNL decisions, but those too got caught in the shutdown. I'm sure that you have piles have accumulated on your desk, but can you advise as to when EPA might now produce them? I understand from the Convening Neutral that the October 21 meeting has been postponed until sometime in November, but we will need some time to review those materials before the meeting. Thanks in advance.

All best,

Nico

Nicholas W. van Aelstyn

Principal
Beveridge & Diamond, P.C.
456 Montgomery St. Suite 1800
San Francisco, CA 94104
T (415) 262-4008 ~ F (415) 262-4040
NvanAelstyn@bdlaw.com



CONFIDENTIALITY STATEMENT: This electronic message contains information from the law firm of Beveridge & Diamond, P.C. and may be confidential or privileged. The information is intended solely for the use of the individual(s) or entity(ies) named above. If you are not the intended recipient, be aware that any disclosure, copying, distribution, or use of the contents of this

message is prohibited. If you have received this e-mail in error, please notify us immediately by telephone at (202) 789-6000 or by e-mail reply and delete this message. Thank you.

Please consider the environment before printing this e-mail.

***** ATTACHMENT NOT DELIVERED *****

This Email message contained an attachment named
image001.jpg
which may be a computer program. This attached computer program could
contain a computer virus which could cause harm to EPA's computers,
network, and data. The attachment has been deleted.

This was done to limit the distribution of computer viruses introduced
into the EPA network. EPA is deleting all computer program attachments
sent from the Internet into the agency via Email.

If the message sender is known and the attachment was legitimate, you
should contact the sender and request that they rename the file name
extension and resend the Email with the renamed attachment. After
receiving the revised Email, containing the renamed attachment, you can
rename the file extension to its correct name.

For further information, please contact the EPA Call Center at
(866) 411-4EPA (4372). The TDD number is (866) 489-4900.

***** ATTACHMENT NOT DELIVERED *****

Nicholas W. van Aelstyn
456 Montgomery Street, Suite 1800
San Francisco, CA 94104-1251
Direct: (415) 262-4008
Fax: (415) 262-4040
nvanaelstyn@bdlaw.com

October 17, 2013

Via E-Mail & U.S. Mail

Rachel Tennis, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

Re: Comments on the California State Lands Commission's June 5, 2013 Letter to U.S. EPA Requesting Removal of the State Lands Commission as a PRP at the Yosemite Slough Site

Dear Ms. Tennis:

This letter provides comments in response to the letter dated June 5, 2013 from Deputy Attorney General David G. Alderson, on behalf of the California State Lands Commission (the "SLC" or the "Commission"), to Thanne Cox ("the SLC Letter") in which the SLC requested that the U.S. Environmental Protection Agency ("EPA") remove it as a potentially responsible party ("PRP") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") at the Yosemite Slough Superfund Site ("Yosemite Slough" or the "Site"). The SLC was named as a PRP at the Site based on its status as an owner of a portion of the Site. EPA's April 5, 2013 General Notice of Potential Liability to the SLC (the "GNL") stated that "EPA believes that [the SLC] may be a PRP at the Site as a[n] owner of part of the Site property." GNL at 2.

Although the SLC holds title to a portion of the Site, it argues that "neither the Commission nor the people of the State of California, on whose behalf the Commission acts, have ever owned any property within the boundary of the Site for purposes of CERCLA liability." The SLC claims that to be an "owner" under CERCLA, an entity must be an owner as defined by common law.

For at least four reasons, the SLC should not be removed as a PRP at the Site. First, as the SLC freely admits, it owns part of the Site, and as such, it is a necessary party because portions of its property will need to be accessed and remediated during the cleanup of the Site. Indeed, the portion of the Site that the SLC states that it currently owns and leases to State Parks lies along the northern boundary of the slough near the mouth, a portion of the Site that EPA's

Draft EE/CA recognizes as a portion that may require active remediation. It also may be a primary point of access to the other portions of the Site requiring remediation.

Second, it would be premature to remove the SLC as a PRP at this juncture. Out of the dozens of PRPs named by EPA at this Site, there is no reason to allow one owner PRP to be separately considered and removed as a PRP. There are many other PRPs – including in particular many alleged arrangers – that also appear to have strong arguments for removal as PRPs. Unless EPA is willing to expend the resources to consider separately arguments from each and every PRP that may have liability arguments at the Site, the SLC should remain a PRP and have its liability determined during the normal course just like all the others.

Finally, the SLC's legal arguments that it is not an owner are far from compelling. Its status as a PRP at Yosemite Slough can be readily distinguished from the two Ninth Circuit cases cited by the SLC. Both of those cases analyzed only whether holders of certain entities that possessed lesser property interests should be considered "owners" under CERCLA. Specifically, in *Long Beach Unified School Dist. v. Dorothy B. Goodwin California Living Trust*, 32 F.3d 1364, 1368 (9th Cir 1994), the Ninth Circuit analyzed whether easement holders should be considered "owners" under CERCLA, and in *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440 (9th Cir 2011), the Ninth Circuit considered whether holders of revocable permits should be considered owners under CERCLA. The SLC's ownership status is very different. According to the SLC, it "currently holds and historically has only ever held title to land which the State of California assumed from the federal government when it became a state in 1850." SLC Letter at 2. Critically, lands granted to states by Congress convey fee simple title, *see* 43 U.S.C. § 859, not the lesser property interests at issue in the two cases upon which the SLC relies.

Moreover, the single judicial decision cited by the SLC that actually addresses whether holding title to state sovereign land constitutes "ownership" under CERCLA is an *unpublished* decision: *United States v. Montrose Chemical Corp.*, CV 90-3122 AAH (C.D. Cal. Oct. 19, 1999). Even if the *Montrose* decision were binding authority, which it is not, the facts of this case have not been developed and briefed sufficiently for a court, much less an administrative agency at an early stage of the proceedings, to make a final determination that the rationale of the unpublished *Montrose* decision should be applied here. It was just a few months ago that EPA clarified the actual ownership of the different portions of the Site, including the transfer of a portion of it from the SLC to the City of San Francisco. Based on our limited research at this early stage¹, it appears that the SLC's title may include several critical elements of common law ownership that would distinguish it from the facts of the *Montrose* case. For example, the SLC was able to sell the property in the slough to the City pursuant to the Burton Act, 1968 Cal. Stat. Ch. 1333. (A complete copy of the Burton Act can be downloaded at

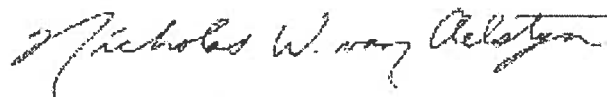
¹ For example, we have not seen the 1983 quitclaim deed reference in the Declaration of Steven Lehman that was submitted along with the SLC letter. While his Declaration included exhibits that reflected his analysis of this deed and other records, the records themselves were not included. Other experts may interpret those records differently.

http://www.sfport.com/ftp/uploadedfiles/about_us/divisions/planning_development/projects/Burton%20Act.pdf; a hard copy is enclosed for your convenience as well.) The State received compensation from the City for this transfer, including a payment equal to the amounts due on the bonded indebtedness incurred for San Francisco Harbor improvements and also indemnification by the City with regard to all outstanding bonded indebtedness. *See* Burton Act at Section 9.

This last point demonstrates one further reason that SLC's request should be denied: it is the former owner of the entire Site. Indeed, SLC owned the entirety of the slough prior to 1968 when much of the contamination likely occurred.

In conclusion, EPA should reject the SLC's request to be removed as a PRP. As the current owner of a key portion of the Site that EPA has stated may require active remediation and which likely also will provide access to the rest of the Site, the SLC is a necessary party. It also owned the entire Site when much of the contamination likely occurred. In addition, it would be premature and improper for EPA to provide early consideration to the liability arguments of a single owner PRP that also happens to be a sister governmental entity while at the same time refusing to consider the equally strong liability arguments of dozens of other PRPs with far more attenuated connections to the Site. Lastly, even if EPA were to provide such special consideration to the SLC's arguments, there are, in addition to these legitimate legal and policy concerns, significant factual questions about whether the SLC has met even the standard for which it advocates. For all the foregoing reasons, we respectfully suggest that EPA deny the SLC's request to be dropped as a PRP.

Sincerely,

A handwritten signature in dark ink, appearing to read "Nicholas W. van Aelstyn". The signature is fluid and cursive, with a long horizontal stroke at the end.

Nicholas W. van Aelstyn

Enclosure

THE BURTON ACT

Reflecting All Amendments Through

May 1994

CHAPTER 1333

An act authorizing the transfer in trust to the City and County of San Francisco the interest of the state in and to, and the control and management of, the Harbor of San Francisco, and declaring the urgency thereof, to take effect immediately.

The people of the State of California do enact as follows:

SEC. 1. This act shall be known and may be cited as the "Burton Act."

SEC. 2. The Director of Finance is hereby authorized to negotiate with the City and County of San Francisco for the transfer, in conformity with the provisions of this act, to the City and County of San Francisco, a municipal corporation of the State of California, or to its successor, in trust for purposes of commerce, navigation, and fisheries and subject to the terms and conditions specified in this act, all of the right, title and interest held by the State of California and acquired by virtue of its sovereignty or otherwise, in and to the real property located in the City and County of San Francisco and presently under the jurisdiction and control of the San Francisco Port Authority, together with all improvements, rights, privileges, easements and appurtenances connected therewith or in anywise appertaining thereto, and any and all personal property of every kind and description owned or controlled by the State of California and used in connection with the operation and

maintenance of San Francisco Harbor and including any deposits of funds held by or for the San Francisco Port Authority; excepting and reserving unto the State of California all subsurface mineral deposits, including oil and gas deposits, together with the right of ingress and egress on the properties conveyed to the City and County of San Francisco for exploration, drilling and extraction of such mineral, oil and gas deposits, subject, however, to the provision that during the term of any lease, franchise, permit or license of such property pursuant to Section 3 of this act, such mineral rights herein reserved to the State of California, including the right of ingress and egress, shall not be exercised so as to disturb or otherwise interfere with the leasehold estate or the rights or encumbrances to which any such lease, franchise, permit or license may be subject; provided, however, that any lease, franchise, permit or license of such property pursuant to Section 3 of this act must contain a provision specifying at least one point from which and the manner in which the right of ingress or egress to said subsurface deposits may be exercised, which said point or points may be outside the area of the leasehold, franchise, permit or license, providing the point or points are adequate to permit the rights reserved to the state to be exercised; and also reserving to the people of the State of California the right to hunt and fish in and over the waters of San Francisco Harbor. The negotiations shall be concluded by October 21, 1968, unless such time is extended by mutual agreement. In lieu of any survey which might otherwise be

required by law, within three years after the effective date of this act, the State Lands Commission shall, at the cost of the Port Commission of the City and County of San Francisco, provide a description of the transferred lands, using such references and designations as are commonly known place names and geographical and political boundaries, and surveying and monumenting only when known designations or points of reference are not available. The description so prepared and a plat thereof shall thereafter be recorded by the State Lands Commission in the office of the Recorder of the City and County of San Francisco. This act shall not apply to any property or interest in property, whether real or personal, owned by or under the jurisdiction or control of the Department of Public Works, Division of Highways, Division of Bay Toll Crossings, or the California Toll Bridge Authority. All that property described in Section 1770 of the Harbors and Navigation Code and transferred to the City and County of San Francisco by this act shall remain subject to any requirements of the Department of Public Works, Division of Bay Toll Crossings, Division of Highways, or the California Toll Bridge Authority for future right-of-way, or easement, or material for the construction, location, realignment, expansion and maintenance of bridges, highways or other transportation facilities without compensation to the City and County of San Francisco, except that in the event improvements, betterments or structures have been placed upon the property transferred, compensation shall be made to the City and County of San Francisco, and to any third party.

entitled thereto, for the value of the improvements, betterments, or structures taken, and except property that was originally acquired for valuable consideration, in which case compensation shall be made to the City and County of San Francisco. The Director of Finance shall be assisted in such negotiations by the Secretary for Agriculture and Services and the San Francisco Port Authority.

SEC. 2.5. Notwithstanding the exception and reservation to the State of California of subsurface mineral deposits, as set forth by Section 2 of this act, as to those materials in the area known as Presidio and Alcatraz Shoals commonly used for purposes of land fill, including, but not limited to, earth, sand, gravel, and aggregates, on or after January 1, 1976, any contract to lease or franchise, or other agreement concerning such area shall be entered into by the mutual agreement of the State Lands Commission and the City and County of San Francisco acting by and through the San Francisco Port Commission. The area subject to this section is hereby more particularly described as follows:

Beginning at Alcatraz Light (X=1,445,185; Y=488,602) located on Alcatraz Island; running thence in a direct line northerly toward Point Blunt Rock (X=1,446,515; Y=498,171) located on Angel Island, for a distance of 900 yards; thence westerly in a direct line toward North Tower (X=1,428,696; Y=488,678) of the Golden Gate Bridge, for a distance of 2,100 yards to a point due South of Point Knox; thence southwesterly in a direct line toward South Tower (X=1,428,995; Y=484,489) of the

Golden Gate Bridge, for a distance of 2,800 yards; thence due South to the shore line of San Francisco; thence generally easterly along the shore line of San Francisco to its intersection with a direct line between Coit Tower (X=1,449,719; Y=479,821) and aforesaid Alcatraz Light; thence northwesterly on last aforesaid line to Alcatraz Light and the point of beginning.

Coordinates shown are California State Grid, Zone 3.

It is not the intent of this section to change any existing right of any party in the subject area.

SEC. 3. The City and County of San Francisco, through a Harbor Commission of the City and County of San Francisco, shall have complete authority, except as otherwise agreed to as a condition of the transfer and as provided in this act, to use, conduct, operate, maintain, manage, regulate, improve and control the harbor of San Francisco and to do all things it deems necessary in connection with the use, conduct, operation, management, maintenance, regulation, improvement and control of said harbor which are not prohibited by the laws of the State of California or the Charter of the City and County of San Francisco and which are in conformance with the terms of this act, including, without limiting the generality of the foregoing, the following:

1. The improvement and conduct of the harbor and the construction, reconstruction, repair and operation of all works, buildings, facilities, utilities, structures and appliances, incidental, necessary or convenient for the promotion and

accommodation of commerce and navigation;

2. The use for all commerce and industrial purposes and the construction, reconstruction, repair, maintenance of commercial and industrial buildings, plants and facilities;

3. The establishment, improvement and conduct of railroad facilities, which facilities shall not be subject to Public Utilities Commission regulation, and aviation facilities and all works, buildings, facilities, utilities, structures and appliances incidental, necessary or convenient for the promotion and conduct of air commerce and navigation and railroad transportation;

4. The construction, reconstruction, repair, maintenance and operation of public buildings, parks, playgrounds, public educational and recreational facilities and all works, buildings, facilities, structures and appliances incidental, necessary or convenient for the promotion and accommodation of any such uses;

5. The preservation or restoration of marine resources consistent with the primary mission of the San Francisco Harbor;

6. The grant of franchises thereof for limited periods not exceeding 66 years for wharves and other public uses and purposes and the lease of said lands, facilities, or any part thereof for limited periods not exceeding 66 years, and the collection and retention of rents and other revenues from such leases, franchises, permits, licenses, and privileges shall be for purposes consistent with the trusts upon which the lands are held by the state and with the requirements of commerce and

navigation, or if the Harbor Commission of the City and County of San Francisco determines that any portion of the transferred lands is not required for the foregoing uses described in this section, such lease or leases, franchises, permits, licenses, and privileges, may be for the purposes of such development and use as the commission finds to be in the public interest, with moneys derived therefrom to be used by the commission in the furtherance of commerce and navigation. The moneys derived from such lease or leases, franchises, permits, licenses, and privileges shall be used solely for the furtherance of the purposes specified by this act.

SEC. 3.5. (a) Notwithstanding any other provision of law, the City and County of San Francisco may transfer to the United States, for inclusion in the Golden Gate National Recreation Area, lands underlying the perimeter of the Municipal Recreation Pier at the foot of Van Ness Avenue, together with all improvements and structures upon or above such lands, that are granted to the city and county pursuant to this act.

(b) Such transfer may be made subject to such conditions as the city and county may impose.

(c) There is hereby excepted and reserved to the state all deposits of minerals, including, but not limited to, all substances specified in Section 6407 of the Public Resources Code, in the lands granted to the city and county by this act; and there is further reserved to the state, or persons authorized by the state, the right to prospect for, mine, and remove such

deposits from the lands, so long as the exercise of such right does not unreasonably interfere with the use of the lands for the purpose specified in subdivision (a).

(d) There is hereby reserved to the people of the state the absolute right to fish in the waters over such lands, with the right of convenient access to such waters for such purpose.

(e) If the United States ceases to use the lands for the purpose specified in subdivision (a), all right, title, and interest of the United States in the lands shall cease and title in the lands shall revert to the city and county.

SEC. 4. The City and County of San Francisco shall establish a separate harbor trust fund or funds upon the transfer in such manner as may be prescribed by the Department of Finance; the city and county shall deposit in the fund or funds all moneys received directly from or indirectly attributable to facilities on the transferred lands in the harbor. An annual statement of financial condition and operations, to conform with such requirements as the Department of Finance may prescribe, shall be submitted to the Department of Finance each year by the city and county on or before September 30th of each year for the preceding fiscal year.

SEC. 5. Notwithstanding any other provision of law to the contrary, the City and County of San Francisco, either acting alone or jointly with another local or state agency, may use revenues accruing from or out of the use of the transferred lands for any or all of the following purposes, provided the same

comply with the terms of the trust which are matters of statewide as distinguished from local or purely private interest and benefit:

1. The construction, reconstruction, improvement, repair, operation, maintenance, promotion, and protection of works, lands, waterways, and facilities necessary for the development of such transferred lands for highest and best use in the public interest, including commerce, navigation, fisheries, marinas, small boat harbors, marine stadiums, maritime museums, marine parks, beaches, and such streets, roadways, bridges, bridge approaches, earthfills, bulkheads, piers, supporting structures, buildings, recreational facilities, landscaping, and parking lots situated upon such transferred lands, or adjacent thereto and reasonably necessary to provide access to, or development of, such transferred lands;

2. The promotion, by advertising and such other means as may be reasonable and appropriate, of maximum public use of such transferred lands or to encourage private investment in development of such transferred lands for the highest and best use in the public interest;

3. Any other uses or purposes of state, as distinguished from purely local or private, interest and benefit, which are in fulfillment of those trust uses and purposes described in this act;

4. The acquisition of property and the rendition of services reasonably necessary to the carrying out of the

foregoing uses and purposes, including the amortization or debt service of any capital improvement funding program which is consistent with the terms and conditions set forth in this act.

SEC. 6. Such revenues may be deposited in one or more reserve funds for use in accordance with the terms and conditions set forth in this act..

SEC. 7. [Repealed - Chapter 745 (1979)]

SEC. 8. [Repealed - Chapter 745 (1979)]

SEC. 9. As express conditions to such transfer, the City and County of San Francisco shall agree to:

1. Indemnify, defend, and hold harmless the state with regard to all outstanding bonded indebtedness incurred for San Francisco Harbor improvements;

2. Transfer to the state amounts necessary to pay the amounts due upon such bonded indebtedness prior to the time such amounts are due; and

3. Assume the obligations and duties of the port authority under all other outstanding contracts, leases, franchises or agreements.

4. Comply with the provisions of this act.

SEC. 10. The transfer authorized by this act shall be deemed to take effect when the voters of the City and County of San Francisco, at an election duly held and conducted, have assented to the transfer under the terms and conditions specified in this act and the results of the election have been certified to according to law.

SEC. 11. Upon certification of the vote specified in Section 10, the authority, justification and control of San Francisco Port Authority over San Francisco Harbor and the facilities thereof shall be deemed transferred to the City and County of San Francisco and the port authority shall cease to function and be dissolved. The City and County of San Francisco shall thereupon assume control and jurisdiction over the San Francisco Harbor and facilities and shall have complete authority to use, operate, maintain, manage, regulate, improve and control the harbor of San Francisco and to do and perform all acts as may be deemed necessary in connection with the use, operation, maintenance, management, regulation, improvement and control of said harbor as may be prescribed.

SEC. 12. San Francisco Harbor and facilities shall be under the administration and control of the Harbor Commission of the City and County of San Francisco which shall be established in accordance with the provision of the Charter of the City and County of San Francisco. The commission shall consist of five members, each member serving for a term of four years. Except as hereinafter provided, each of said members shall be appointed by the mayor, said appointment being subject to confirmation by the Board of Supervisors of the City and County of San Francisco. In order that there be no interruption in the orderly operation and management of San Francisco Harbor, the incumbent members of the San Francisco Port Authority shall serve as the initial members of the commission for periods corresponding to the unexpired

portions of their respective terms as members of the San Francisco Port Authority.

SEC. 13. The Department of Finance, at the request of the City and County of San Francisco, shall grant an extension of time, not to exceed 30 calendar days, for filing any report or statement required by this act which was not filed due to mistake or inadvertence.

SEC. 14. In the event that the City and County of San Francisco fails or refuses to file with the Department of Finance any report, statement, or document required by any provision of this act within the time period specified by this act, or any extension period granted pursuant to this act, or fails or refuses to carry out the terms of the transfer by which the lands were transferred to it pursuant to this act, the Attorney General shall, upon request of the Department of Finance, bring such judicial proceedings for correction and enforcement as are appropriate, and shall act to protect any properties and assets situated on the transferred lands or derived therefrom. The Department of Finance shall notify the Chief Clerk of the Assembly and the Secretary of the Senate within 30 days of the occurrence of such failure or refusal and of actions taken as a result thereof.

SEC. 15. The Department of Finance shall, from time to time, recommend to the Legislature such amendments as it may deem necessary in the terms and conditions of this act.

SEC. 16. The Department of Finance shall, from time to

time, institute a formal inquiry to determine that the terms and conditions of this act, and amendments thereto, have been complied with, and that all other applicable provisions of law concerning these specific transferred lands are being complied with in good faith.

SEC. 17. The Department of Finance shall, on or before December 31st of each year, report to the Chief Clerk of the Assembly and to the Secretary of the Senate, the full details of any transaction or condition reported to the department pursuant to this act which it deems in probable conflict with the requirements of this act, or with any other provision of law.

SEC. 18. The Legislature reserves the right to amend, modify, or revoke, in whole or in part, the transfer of lands in trust provided for in this act, provided that the state shall thereupon assume all lawful obligations related to such lands as may revert to the state by such action.

SEC. 19. The Attorney General, at his own instance, or upon formal request of the Department of Finance, or by resolution of either house of the Legislature, shall bring an action in the superior court of the city and county to declare that the transfer under which the city and county holds such transferred lands is revoked for gross and willful violation of the terms of such transfer or the provisions of this act or other legislative enactment, or to compel compliance with the terms and conditions of the transfer and any other provision of law including, but not limited to, this act.

SEC. 20. All persons actually employed in the service of the San Francisco Port Authority at the time this act takes effect and who at said date shall be entitled to the benefits of the civil service provisions of the State of California insofar as the same may be applicable to the employees of the San Francisco Port Authority, shall be continued in their respective positions and shall continue to hold their positions pursuant to the civil service provisions of the Charter of the City and County of San Francisco and they shall be entitled to all of the rights, benefits, and privileges which such persons might have or might have had, had such persons been originally appointed to their respective positions under certification from the civil service commission of the City and County of San Francisco, and in the matter of seniority in service of such employees entitled to the benefits of said civil service provisions as herein provided, the seniority of each employee shall be reckoned from his first permanent appointment to employment under the State of California, and as to their respective positions such employees shall have preference over all other employees of the City and County of San Francisco. The employment rights of such state employees shall be fully protected at the time of the transfer authorized by this act. Salary, employment conditions, and benefits shall be no less than those received by the employees of the San Francisco Port Authority at the time of transfer. These rights and benefits include, but are not limited to: probationary or permanent civil service status, and any career executive

appointments; retention of employees' positions on existing subdivisional and departmental promotional and eligible lists, as long as they are in effect; no less than the same wage and salary range for comparable classes; overtime and shift premium pay whenever and wherever applicable; callback and standby pay whenever and wherever applicable; continued membership in the Public Employees' Retirement System provided by the City and County of San Francisco, or any other retirement program in effect with the San Francisco Port Authority; retention of vacation and sick leave balances which such employees now have when they become employees of the City and County of San Francisco; waiver of residence requirements; and retention of the option to continue any present health insurance and group life coverage. Upon assent to the transfer of lands as authorized by this act by the City and County of San Francisco, any employee desiring to transfer to another state agency or to be placed on a state layoff list may do so within six months of such assent and shall retain all state civil service rights and benefits.

SEC. 21. If negotiations are not concluded by October 21, 1968, unless such time is extended by mutual agreement, or if by December 31, 1970, the transfer authorized by this act has not been negotiated and the voters of the City and County of San Francisco have not assented to the transfer, the provisions of this act shall be on no further force or effect.

SEC. 22. On or before August 14, 2003, the lands transferred pursuant to this act shall be substantially improved

by the city and county without expense to the state, and the city and county shall issue bonds in the amount of at least twenty-five million dollars (\$25,000,000) for harbor purposes.

If the Department of Finance determines that the city and county has failed to improve the lands as herein required and issue such bonds as herein required, all right, title, and interest of the city and county in and to all such lands shall cease and the lands shall revert and rest in the state.

SEC. 23. This act is an urgency statute necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

It is desirable that the voters of the City and County of San Francisco have an early opportunity to vote on the transfer authorized by this act. The earliest and most convenient opportunity for a vote by the people of the City and County of San Francisco on this matter is the forthcoming general election in November of this year. In order that there will be sufficient time available after the effective date of this act to prepare for such a vote on this matter at the forthcoming general election, it is necessary that this act shall go into immediate effect.

SEC. 24. No amendment, modification, or revocation, in whole or in part, of the transfer of lands in trust provided for in this act, whether made pursuant to Sections 9, 18, 19 or 22, or otherwise, shall impair or affect the rights or obligations of

third parties, including the holders of revenue bonds or securities issued by the Harbor Commission of San Francisco and payable out of revenues of the harbor, lessees, lenders for value, holders of contracts conferring the right to the use and occupation of, or the right to conduct operations upon or within, such lands, arising from leases, contracts, or other instruments lawfully entered into prior to the effective date of such amendment, modification, or revocation.

In the event, at the effective date of any such amendment, modification, or revocation, there are in effect any such leases, contracts, or other instruments the state may, at its option exercised by, and evidenced by appropriate action on the part of, the State Lands Commission, succeed to the interest in any such instrument of the City and County of San Francisco; otherwise the interest of the City and County of San Francisco in any such instrument then in effect shall continue during the term or other period of time during which such instrument shall remain in effect; and provided further, that in any event all revenue bonds or securities issued by the Harbor Commission of San Francisco and payable out of revenues of the harbor shall continue to be so payable and secured in all respects as provided in the proceedings for their issuance and the revenues of the harbor shall be pledged to and applied to the payment of such revenue bonds or securities in all respects as though no such amendment, modification, or revocation had taken place.

4995b

310y

310 An act relating to lands granted in trust to the City and County of San Francisco, and declaring the urgency thereof, to take effect immediately.

Approved by Governor July 29, 1987
. Filed with Secretary of State July 30, 1987.

LEGISLATIVE COUNSEL'S DIGEST

AB 2659, W. Brown. San Francisco Harbor: Burton Act.

Under existing law (the Burton Act), the City and County of San Francisco has been granted lands from the state, in trust for purposes of commerce, navigation, and fisheries and subject to specified terms and conditions relating to the operation of the Harbor of San Francisco.

This bill would declare specified seawall lots among the granted lands to be free from the public trust for commerce, navigation, and fisheries, but would require the described property to continue to be held in trust by the city and county subject to the terms and conditions of the Burton Act and subject to specified use restrictions. The bill would specify requirements relating to use of the lands for the Rincon Point-South Beach Redevelopment Project and would authorize the city and county to exchange portions of the granted lands for lands of equal or greater value that are useful for trust purposes authorized in the Burton Act subject to specified determinations and to specified actions by the State Lands Commission.

The bill would make legislative findings and declarations in this connection.

The bill would declare that it is to take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. The Legislature hereby finds and declares as follows:

(a) Pursuant to the Burton Act (Chapter 1333 of the Statutes of 1968) the state conveyed by transfer agreement certain tide and submerged lands to the City and County of San Francisco, in trust for purposes of commerce, navigation, and fisheries, and subject to the terms and conditions specified in that act.

(b) Certain portions of the tide and submerged lands, being Seawall Lots 331, 332, and 333, including Fremont Street between the southeasterly line of Brannan Street and the westerly line of the Embarcadero, as shown on the map of the lands transferred in trust to the City and County of San Francisco, which was recorded May 14, 1976, in Book W of official records at pages 66 to 72, inclusive, in the Office of the Recorder of the City and County of San Francisco, have been filled and reclaimed as a result of a plan of improvement for harbor development. The lots are irregular in shape, are cut off from access to waters of San Francisco Bay, constitute a relatively small portion of the granted tide and submerged lands, and, except for the production of revenue to support the statutory trust purposes in furtherance of

DELETED MATERIAL IS IN BRACKETS []. ADDED MATERIAL IS CAPITALIZED.

1 which the tide and submerged lands are held by the city and county, are
2 no longer needed or required for the promotion of the public trust for
3 commerce, navigation, and fisheries or the statutory trusts.

4 (c) The city and county has approved the Rincon Point-South Beach
5 Redevelopment Project, which is to be undertaken by the San Francisco
6 Redevelopment Agency. Certain of the lands included within the project
7 area are tide and submerged lands, both filled and unfilled, held by the
8 city and county under its grant from the state. These granted lands will
9 be leased to the redevelopment agency for purposes of undertaking and
10 completing the project. Upon completion of the Rincon Point-South Beach
11 Redevelopment Project improvements, it is contemplated that the leasehold
12 interest of the redevelopment agency will be terminated, and that the San
13 Francisco Port Commission, which administers the granted lands on behalf
14 of the city and county, will either reassume the direct administration of
15 the granted lands, or succeed to the sublessor status of the
16 redevelopment agency with regard to certain subleases executed in
17 furtherance of the project. Among the project improvements to the
18 granted lands are a 683-berth marina and harbor complex, two major
19 shoreline parks, and transportation improvements to the Embarcadero and
20 other streets serving the granted lands. In addition, housing and
21 commercial development is to take place within the project area as a
22 whole, and portions of this development will be constructed on Seawall
23 Lots 331, 332, and 333, including Fremont Street between the
24 southeasterly line of Brannan Street and the westerly line of the
25 Embarcadero. By reason of its superior financing methods, the
26 redevelopment agency can immediately undertake and complete the marina
27 and harbor complex, the shoreline parks, and the transportation
28 improvements on the granted lands. It is unlikely that the port itself
29 would be able to construct the improvements within a similar time period,
30 given certain financial constraints and competing priorities regarding
31 development of maritime port facilities. Upon completion of the project,
32 the purposes of the Burton Act and the public trust will have been
33 furthered to an extent beyond what could have been achieved absent
34 implementation of the redevelopment project.

35 (d) Seawall Lots 331, 332, and 333, including Fremont Street between
36 the southeasterly line of Brannan Street and the westerly line of the
37 Embarcadero, should be freed of the public trust for commerce,
38 navigation, and fisheries, but should continue to be held by the City and
39 County of San Francisco in trust subject to the terms and conditions
40 specified in the Burton Act, as amended, and subject to the terms and
41 conditions of the transfer agreement executed pursuant to that act,
42 except that there should be no restrictions on use, other than the use
43 restrictions of the Rincon Point-South Beach Redevelopment Plan as long
44 as applicable, and the requirement that the revenue derived from the
45 leasing or administration of those seawall lots, including Fremont Street
46 between the southeasterly line of Brannan Street and the westerly line of
47 the Embarcadero, be deposited in a trust fund or funds created pursuant
48 to Section 4 of the Burton Act, to be used solely for the furtherance of
49 the purposes specifically authorized in that act.

50 (e) The release of the seawall lots, including Fremont Street between

1 the southeasterly line of Brannan Street and the westerly line of the
2 Embarcadero, from the public trust for commerce, navigation, and
3 fisheries to the extent set forth in subdivision (d) is in the best
4 interests of the people of this state.

5 SEC. 2. Seawall Lots 331, 332, and 333, including Fremont Street
6 between the southeasterly line of Brannan Street and the westerly line
7 of the Embarcadero, as shown on the map of the lands transferred in
8 trust to the City and County of San Francisco, which was recorded May 14,
9 1976, in Book W of official records at pages 66 to 72, inclusive, in the
10 Office of the Recorder of the City and County of San Francisco, being a
11 portion of land conveyed in trust to the City and County of San Francisco
12 pursuant to the Burton Act (Chapter 1333 of the Statutes of 1968), are
13 hereby declared to be free from the public trust for commerce,
14 navigation, and fisheries, but shall continue to be held in trust by the
15 city and county subject to the terms and conditions specified in the
16 Burton Act, as amended, and subject to the terms and conditions of the
17 transfer agreement executed pursuant to that act, except that there shall
18 be no restrictions on use, other than the use restrictions of the Rincon
19 Point-South Beach Redevelopment Plan as long as applicable, and other
20 than the following:

21 (a) The revenues derived from leasing or administration of the
22 described property shall be deposited in a trust fund or funds created
23 pursuant to Section 4 of the Burton Act, and shall be used solely for the
24 furtherance of the purposes specifically authorized in that act.

25 (b) Leases of the described property shall terminate not later than
26 September 26, 2050, in accordance with the limitations of the Burton
27 Act. The San Francisco Port Commission may release the property for
28 additional periods, but is not required to do so.

29 (c) All leases, contracts, or other instruments entered into after
30 May 1, 1987, between the San Francisco Port Commission and the
31 redevelopment agency, the redevelopment agency and any other person or
32 entity, or the San Francisco Port Commission and any other person or
33 entity, conferring the right to use all or some portion of the described
34 property shall be subject to the approval of the State Lands Commission
35 in order to assure that the consideration received is consistent with
36 prudent land management practices. For as long as the Rincon
37 Point-South Beach Redevelopment Plan is applicable, this review shall
38 take into consideration the use restrictions of the redevelopment plan.
39 In reviewing those instruments, the State Lands Commission shall not
40 substitute its judgment for that of the redevelopment agency, but shall
41 approve the instrument unless it determines within 45 days after
42 receipt of the instrument, that the instrument does not fall within the
43 range of reasonable business judgments that conform to the standard set
44 forth in this subdivision.

45 SEC. 3. Not later than the date of completion of the last of the
46 improvements that are proposed by the Rincon Point-South Beach
47 Redevelopment Project, the San Francisco Redevelopment Agency shall offer
48 to terminate its master lease with the San Francisco Port Commission.
49 The San Francisco Port Commission shall accept that offer to terminate
50 the master lease unless to do so would not be in the best interests of

1 the trust in furtherance of which the lands were granted to the city and
2 county. If it desires to reject the offer to terminate, the San
3 Francisco Port Commission shall first obtain the concurrence of the State
4 Lands Commission that the acceptance would not be in the best interest of
5 the trust. Nothing in this section shall prohibit the earlier
6 termination of the master lease as to all or some portion of the property
7 that is subject to the master lease, except that the San Francisco Port
8 Commission shall not agree to an earlier termination of the master lease
9 without first obtaining the concurrence of the State Lands Commission
10 that the termination is in the best interest of the trust in furtherance
11 of which the lands were granted to the city and county.

12 SEC. 4. Notwithstanding Sections 6701 and 6702 of the Public Resources
13 Code, no amendment, modification, or revocation, in whole or in part, of
14 the grant made to the City and County of San Francisco pursuant to the
15 Burton Act shall impair or affect the rights or obligations of third
16 parties, including lessees and lenders for value, under leases,
17 contracts, or other instruments previously approved by the State Lands
18 Commission pursuant to subdivision (c) of Section 2.

19 SEC. 5. (a) Subject to the requirements for state approval specified
20 in subdivision (b), whenever it is determined by the City and County of
21 San Francisco that there are other portions of the granted lands that
22 have been filled and reclaimed, that are cut off from access to the
23 waters of San Francisco Bay, that constitute a relatively small portion
24 of the granted tide and submerged lands, and that are no longer needed or
25 required for the promotion of the public trust for commerce, navigation,
26 and fisheries or the statutory trust, and when it is further determined
27 that no substantial interference with the trust uses and purposes
28 will ensue, the city and county may exchange those lands with any state
29 agency, political subdivision, person, entity, or corporation, or the
30 United States, or any agency thereof, for lands of equal or greater value
31 that are useful for the particular trust purposes specifically authorized
32 in the Burton Act.

33 (b) No such exchange shall be effective unless and until the State
34 Lands Commission does both of the following:

35 (1) Finds that the lands to be acquired by the City and County of San
36 Francisco have a value equal to or greater than the value of the lands
37 for which they are to be exchanged.

38 (2) Adopts a resolution of approval which finds and declares that the
39 granted lands have been filled and reclaimed, are cut off from access to
40 the waters of San Francisco Bay, constitute a relatively small portion of
41 the lands granted to the city and county, and are no longer needed or
42 required for the promotion of the public trust for commerce, navigation,
43 and fisheries or the statutory trust, and further, that no substantial
44 interference with the trust uses and purposes will ensue by virtue of the
45 exchange. Upon adoption of the resolution, the granted land shall
46 thereupon be free from the public trust for commerce, navigation, and
47 fisheries, and the lands received in exchange shall be held subject to
48 the public trust and to the terms of the Burton Act.

49 (c) Exchanges made pursuant to this section are hereby found to be of
50 statewide significance and importance, and, therefore, any ordinance,

1 charter provision, or other provision of local law inconsistent with this
2 section shall not be applicable to the exchange.

3 SEC. 6. This act is an urgency statute necessary for the immediate
4 preservation of the public peace, health, or safety within the meaning of
5 Article IV of the Constitution and shall go into immediate effect. The
6 facts constituting the necessity are:

7 Certain of the lands granted by the state pursuant to the Burton Act
8 are proposed to be more fully used by the City and County of San
9 Francisco as part of a redevelopment project that will maximize benefit
10 to the trust purposes in furtherance of which the granted lands are held.
11 The project will substantially and immediately further those trust
12 purposes to an extent that would not be possible in the absence of the
13 project. Procedures leading to the execution of the leases are rapidly
14 approaching completion, thus necessitating an immediate clarification of
15 the uses to be made of the land under the Burton Act in order to avoid
16 prolonged delays in realizing the fullest use of those lands for the
17 maximum benefit of the statutory trust purposes. It is necessary,
18 therefore, that this act take effect immediately.
19

